92-1498

Supreme Court, U.S.
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No.....

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SANDRA G. WILDER,
Petitioner
v.
WARREN F. EBERHART, M.D. and
THE CONCORD CLINIC, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Where the New Hampshire Supreme Court has held as a matter of law that the bare *possibility* that something other than a tortfeasor's negligence might have caused a plaintiff's personal injuries is not a sufficient answer to defeat the plaintiff's prima facie case, did the Court of Appeals err by not following state law contrary to *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S Ct 817, 82 L Ed 1188 (1938) and 28 USC §1652 when it set aside the petitioner's verdict on the grounds that the District Court should have allowed the respondents' experts to offer opinions of other possible causes of the petitioner's injuries?

II. Where the respondents successfully appealed to the Court of Appeals on an issue of New Hampshire law which had been decided by the District Court in favor of the petitioner in a case which resulted in a jury verdict in favor of the petitioner, did the Court of Appeals err in denying the petitioner's motion to certify questions to the New Hampshire Supreme Court on the grounds that her motion should have been filed at the time of trial?

III. Where the respondents successfully appealed to the Court of Appeals on an issue of New Hampshire law which had been decided by the District Court in favor of the petitioner in a case which resulted in a jury verdict in favor of the petitioner, did the Court of Appeals err by prohibiting the petitioner and the District Court from requesting certification of questions to the New Hampshire Supreme Court upon remand to the District Court for a new trial?

TABLE OF CONTENTS

Questions Presented i
Table of Contents ii
Table of Authorities iii
Reports of Opinions 1
Jurisdiction 1
Statutes Involved 2
Statement of the Case 2
Argument 8
Question I 8
Question II 14
Question III 15
Conclusion 17
Appendix A1

A. Court of Appeals

1. October 8, 1992 Decision on Appeal A1

2. December 17, 1992 Order Denying Petitioner's Petition for Rehearing, Suggestion for Rehearing In Banc and Motion for Certification of Questions A8

B. District Court

1. December 9, 1991 Order Granting Petitioner's Second Motion in Limine and Bench Conference B1

2. February 11, 1992 Order on Respondents' Post Trial Motions B6

3. December 31, 1992 Order of Recusal B12

TABLE OF AUTHORITIES

Cases

Boucher v. Larochelle, 74 N.H. 433, 68 A 870 (1908) Page 9

Brann v. Exeter Clinic, Inc., 127 N.H. 155, 498 A.2d 334 (1985) Page 12

Crawford v. Maine Central Railroad, 76 N.H. 29, 78 A. 1078 (1911) Page 8 & 9

Croteau v. Olin Corp., 884 F.2d 45 (1st Cir., 1989) Page 14

Erie R. Co. v. Tompkins, 304 US 64, 58 S Ct 817, 82 L Ed 1188 (1938) Page 8

Larue v. National Union Electric Corp., 571 F. 2d 51 (1st Cir., 1978) Page 12

Lehman Brothers v. Schein, 416 US 386, 94 S Ct 1741, 40 L Ed 2d 215 (1974) Page 15 & 17

Saad v. Papageorge, 82 N.H. 294, 133 A. 24 (1926) Page 10

Salve Regina College v. Russell, 499 US ____, 111 S Ct 1217, 113 L Ed 2d 190 (1991) Page 16 & 17

Tzimas v. Coiffures by Michael, 135 N.H. 498, 606 A.2d 1082 (1992) Page 11 & 12

Willey v. Ketterer, 869 F.2d 648 (1st Cir., 1989) Page 12

Statutes

28 USC §1652 Page 1, 2 & 8

28 USC §1254 (Supp. 1992) Page 2

Treatises

17A C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure-2d*, §4248 (1988) and (Supp. 1992) Page 15

19 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure-2d*, §4512 (1982) Page 9

OPINIONS AND ORDERS BELOW

The decision on appeal to the Court of Appeals, and its order denying Petitioner's Petition for Rehearing, Suggestion for Rehearing In Banc and Motion for Certification of Questions appear in Appendix A.

The District Court's order granting the Petitioner's Second Motion in Limine and bench conference, order on respondents' post trial motions and order of recusal appear in Appendix B.

JURISDICTION

The Petitioner respectfully submits that the reasons why this Court should review this case on writ of certiorari are:

1. Pursuant to Supreme Court Rule 10 1(a), the Court of Appeals has, by its decision in this case, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. Pursuant to Supreme Court Rule 10 1(c), the Court of Appeals has decided a question of federal law under 28 USC §1652 in a way that conflicts with applicable decisions of this Court.

The Court of Appeals' order in which it set aside the jury's verdict, vacated the judgment of the District Court and remanded the cause to the District Court for a new trial was entered October 8, 1992.

On October 20, 1992 the petitioner filed a Petition for Rehearing pursuant to FRAP 40, made Suggestion for Rehearing In Banc pursuant to FRAP 35, filed a Motion for Certification of Questions to the New Hampshire Supreme Court and filed a Motion to Stay Entry of Judgment pursuant to FRAP 8. By order dated December 17, 1992 the Court of Appeals denied the Petition for Rehearing, Suggestion for Rehearing In Banc and Motion for Certification of Questions. The Petitioner filed her Petition for Certiorari within 90 days of that order.

This Court's jurisdiction is invoked under 28 USC §1254 (1).

STATUTES INVOLVED

Title 28 USC §1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treatises of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944

STATEMENT OF THE CASE

Sandra Wilder, a 48-year-old licensed practical nurse of Barre, Vermont, brought this medical malpractice action in the District Court based on diversity of citizenship, 28 USC §1332, against Warren F. Eberhart, M.D. and the Concord Clinic, Inc. seeking damages for the injuries she received as a result of the substandard care rendered by the respondents. The service provided by Dr. Eberhart as a director and employee of the Concord Clinic was a vertical banded gastroplasty (VBG), a surgical procedure developed by the respondents' chief medical witness, Edward E. Mason, M.D., for the purpose of helping morbidly obese people lose weight. What was intended to be a single surgical procedure normally followed by a one-week hospital stay became a 115-day hospitalization during which Mrs. Wilder underwent three major abdominal surgeries and resulted in the loss of her lower esophagus and upper stomach.

Mrs. Wilder claims that this catastrophic experience was caused by Dr. Eberhart's carelessness in perforating her esophagus during the June 12, 1985 procedure, in failing to confirm the tear and reoperate on June 12 to correct the perforation, in failing to give Mrs. Wilder supplemental nutrition beginning on June 13, 1985 to maintain her nutritional status and encourage wound healing, and in failing to both confirm the condition of her esophagus on June 17, 1985 and reoperate to correct a probable esophageal leak.

Mrs. Wilder was admitted to the Concord Hospital on June 11, 1985 in good health and was considered to be a good risk for this surgery. The following day she underwent the vertical banded gastroplasty. The procedure went uneventfully until near the end when Dr. Eberhart discovered a three to three-and-a-half centimeter tear in the lower esophagus near the esophagogastric junction. He repaired this tear by closing it with sutures and by suturing a fold of the gastric tissue around the repair site for additional support. Afterward, petitioner was sent to the recovery room with orders that she could take no food by mouth for the next several days. Dr. Eberhart did not give her supplemental intravenous nutrition known as TPN or HAL.

While in the recovery room the nurse noticed that the nasogastric tube had become kinked in Mrs. Wilder's mouth. The nurse removed it and notified Dr. Eberhart. Dr. Eberhart examined the tube and the petitioner, reinserted the tube and ordered a chest x-ray to determine the status of the surgical site. The radiology report indicated that the course of the nasogastric tube was "worrisome" to the radiologist because it did not appear to conform to the expected course within her stomach. Dr. Eberhart ordered a Gastrografffin swallow to confirm the location of the tube. This was not performed, however, until 9:30 a.m. on June 13, and it confirmed that there was leakage from the site of the esophageal tear.

Dr. Eberhart reoperated at 10:55 a.m. on June 13 and discovered not one but two tears in Mrs. Wilder's lower esophagus, one of which was the previous tear which had reopened. During this operation Dr. Eberhart had to extend his incision upward and to the left under Mrs. Wilder's left breast, thereby removing a piece of her rib

cage to gain full exposure. After the surgery no TPN or HAL was provided to Mrs. Wilder.

Over the next several days Mrs. Wilder remained uncomfortable. By June 17 her temperature rose to nearly 103 degrees Fahrenheit, and thereafter, her condition deteriorated.

On June 20 bright red blood appeared in her drainage. The results of an x-ray ordered by Dr. Eberhart prompted him to reoperate. He discovered that the interior of her abdomen was covered with a large fibrinous peel and her lower esophagus and upper stomach had become necrotic. He had no choice but to cut the dead tissues out, sew the upper side of her stomach closed and reconnect what was left of the esophagus and upper stomach by an anastomosis.

Five days later at Mrs. Wilder's request she was transferred to the Dartmouth-Hitchcock Medical Center in Hanover, New Hampshire where she came under the care of Dr. Robert Crichlow. Immediately upon her admission to the medical center she was found to be malnourished and was placed on TPN which continued for the better part of her 101-day hospital stay at that institution. By the time of her return to light duty as a licensed practical nurse in late November, 1985, she had accrued $72,196.82 in medical bills and $6,174.00 in lost earnings and benefits.

At trial the petitioner established a prima facie case through the testimony of Saul Weinstein, M.D. and Robert Crichlow, M.D. Dr. Weinstein testified that to a reasonable medical probability Dr. Eberhart fell below the standard of medical care by carelessly mobilizing the esophagus during the June 12, 1985 VBG, by failing to confirm the tear and reoperate to repair it on June 12, by failing to give Mrs. Wilder TPN or HAL on June 13, and by failing to confirm the condition of her esophagus on June 17, 1985 and reoperate to correct a probable esophageal leak. Dr. Weinstein testified further that Dr. Eberhart's negligence was the probable cause of the death of the petitioner's lower esophagus and upper stomach, the removal of those tissues and her prolonged hospitalization.

On the morning of the respondents' presentation of their first

medical expert, David Sugarbaker, M.D., the petitioner filed her Second Motion in Limine to prevent the respondents' experts from stating opinions of an alternative cause of the petitioner's injuries based only upon a bare possibility. The respondents objected and argued that no one, including the petitioner's expert, should be able to say that more probably than not the cause of Mrs. Wilder's perforated esophagus was Dr. Eberhart's mobilization of that organ during the VBG. Respondents' counsel argued that their experts would testify that among a variety of *possibilities* the passage of the Maloney dilator by the anesthesiologist was a possible cause, but the respondents were not claiming the anesthesiologist was at fault. Respondents' counsel stated that he was *not* about to prove to a medical *probability* that the cause of the petitioner's injuries was one thing or another. The respondents only wanted to present to the jury expert opinions of other possibilities. Respondents' counsel intended to rank these possibilities for the jury and argue that the "most likely possibility" [sic] was "instrumentation", i.e. the passage of the Maloney dilator by the anesthesiologist.

The petitioner argued that the admission of such opinions was contrary to New Hampshire law. That law provides that once a plaintiff establishes a prima facie case the defendant cannot as a matter of law set up as an answer to the action the bare possibility that the plaintiff's injury might have occurred in some other way. The defendant's burden of production can only be met by offering sufficient evidence to show that the plaintiff's injuries were *probably not* the result of the defendant's negligence.

The District Court granted the petitioner's Motion in Limine. The court did allow the respondents to introduce expert testimony on general medical lore concerning the variety of possible causes of esophageal injury during a number of medical procedures and under a number of conditions.

After deliberating for approximately six hours the jury returned a verdict in favor of Mrs. Wilder in the amount of $685,000.00. On December 24, 1991, the respondents filed a Renewed Motion for Judgment as a Matter of Law, Motion for New Trial, Motion for

Remittitur and Supporting Memorandum of Law. Each of these motions were objected to by the petitioner on January 9, 1992. By order dated February 11, 1992, the District Court denied each of the respondents' motions. On March 3, 1992 respondents filed their Notice of Appeal to the Court of Appeals for the First Circuit.

In the respondents' brief, and also at oral argument before the Court of Appeals, the respondents argued that their expert witnesses were prepared to testify that among a variety of possible causes of the petitioner's injuries the *"most likely cause"* was the passage of the Maloney dilator by the anesthesiologist. (Emphasis added). However, this claim is not accurate. The respondents' experts' reports in the record, their deposition testimony and the respondents' offer of proof at trial (Appendix B, pages, 1-5) unequivocally reveal that these experts' opinions amounted to only a bare *possibility* and no more.

Nevertheless, the Court of Appeals concluded that the respondents were prepared to offer expert opinions based on a probability that something other than the respondents' negligence caused the petitioner's injuries, and by order dated October 8, 1992 set aside the verdict in favor of the petitioner, vacated the judgment of the District Court and remanded the case to the District Court for a new trial. In its opinion, the Court of Appeals held that by preventing the respondents from offering testimony as to other possible causes of the petitioner's injuries, the District Court "effectively shifted the burden *somewhat* to the defendant, because he now had to prove more probably than not, that another cause, not manipulation, was the cause of Ms. Wilder's injury." (Emphasis added). The Court of Appeals concluded further "that such a result does not reflect the state of the law in New Hampshire, and furthermore would be manifestly unjust and unduly burdensome on defendants." (Appendix A, page 7).

On October 20, 1992 the petitioner filed a Petition for Rehearing, a Suggestion for Rehearing In Banc, a Motion to Stay Entry of Judgment and a Motion for Certification of Questions to the New Hampshire Supreme Court. In her Petition for Rehearing the petitioner argued that the Court of Appeals overlooked or misappre-

hended the New Hampshire case law which she cited in her brief. These cases specifically provide that once the plaintiff establishes that her injuries were probably caused by the defendants' negligence, the defendants' burden of production is *not* satisfied by proving that there may have been other *possible* causes of the plaintiff's injuries. However, these cases were neither countered by the respondents nor mentioned in the Court of Appeals' written decision.

On December 17, 1992 the Court of Appeals issued its order denying Mrs. Wilder's Petition for Rehearing and her Suggestion for Rehearing In Banc. It also denied her Motion for Certification of Questions to the New Hampshire Supreme Court on the grounds that her motion was "too late" since she had never requested certification from the District Court. Noting that to allow certification at that stage of the proceedings would amount to an appeal of the Court of Appeals' decision to the New Hampshire Supreme Court, the Court of Appeals ruled that "certification is no longer the appropriate course either before us or on remand to the District Court." The Court of Appeals reiterated that "the defendant desired to produce evidence that there were other causes for the injury that were *more likely* than the cause that the plaintiff offered", (emphasis added), despite the fact that these very experts' reports and the respondents' offer of proof at trial, which are part of the record, reveal that these experts were neither able nor willing to state these opinions to a *probability* or *likelihood*.

As a result of this order, Judge Martin Loughlin of the District Court issued his Order of Recusal on December 31, 1992, stating that he believed the Court of Appeals' interpretation of New Hampshire law is clearly wrong and will have dire consequences. He stated further that the Court of Appeals had reached the erroneous conclusion that the respondents' experts were prepared to give opinions on an alternative cause of the petitioner's injuries based on a probability rather than a bare possibility. (Appendix B, page 13).

It is from the two orders of the Court of Appeals which Mrs. Wilder petitions this Court for a Writ of Certiorari.

ARGUMENT

I

As a diversity case brought in the District Court based on a New Hampshire common law negligence cause of action, New Hampshire law must control on issues which are of consequence to the determination of the action. *Erie R. Co. v. Tompkins*, 304 US 64, 82 L Ed 1188, 58 S Ct 817 (1938); *see also* 28 USC § 1652. At the trial of this medical malpractice case, the petitioner sought to prevent the respondents from offering expert medical testimony that the initial tear in the petitioner's esophagus was possibly caused by the anesthesiologist's passage of the Maloney dilator down Mrs. Wilder's esophagus during surgery. The New Hampshire law on the subject states that where the injury is a natural and probable result of the defendant's negligence, the possibility that something else might have been the primary cause thereof is not an answer as a matter of law. *Crawford v. Railroad*, 76 N.H. 29, 31, 78 A. 1078, 1079 (1911).

In *Crawford*, the plaintiff brought a lawsuit for the wrongful death of his wife who died after contracting a severe cold from exposure as a result of the defendant's negligent failure to maintain its railroad station for the health and safety of waiting passengers. The defendants moved for a nonsuit and verdict on the grounds that Mrs. Crawford may have contracted her cold by exposure to contagion as well as by exposure to the weather at the station. In attempting to establish its case, the defendant excepted to the exclusion of questions to both the plaintiff's and defendant's expert physicians which were intended to elicit opinions that it was *possible* the decedent died as a result of something other than the defendant's negligence. Following a plaintiff's verdict the defendant appealed. The supreme court found that the defendant offered no evidence that death was caused by exposure to contagion, and held:

> Upon the evidence, Mrs. Crawford's illness was a natural and probable result of the condition created by the defendant's negligence. *The possibility that something else might have been the primary cause thereof is*

not an answer as a matter of law. (Emphasis added).

Id. 76 N.H. at 31, 78 A. at 1079.

Since an expert's opinion about other possible causes of the plaintiff's injuries is not sufficient to rebut a prima facie case as a matter of law, the supreme court reasoned that the expert testimony offered by the defendant was not material upon any issue in the case. In the instant case, under the federal rules of evidence, the issue of materiality is governed by the applicable state substantive law. 19 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure-2d* §4512, at 194 (1982).

In reaching its decision, the court in *Crawford* applied the rule of a previous tort case which likewise addressed the effect that evidence of possible alternative causes has on the issue of causation. In *Boucher v. Larochelle*, 74 N.H. 433, 68 A. 870 (1908), the plaintiff brought a wrongful death action for the malpractice of an anesthesiologist as a result of the substandard administration of anesthesia. The plaintiff proved that the negligent administration of anesthesia can cause death, and that the defendant's lack of due care in administering the anesthesia likely caused the death of the plaintiff's decedent. The defendant attempted to prove that it was *possible* the death could have been caused by an embolism or the combination of the anesthesia and a rare pathologic condition which the decedent may have had. At the close of the evidence the defendant moved for a nonsuit on the grounds that the plaintiff failed to prove the cause of the decedent's death. The court denied the motion and found that the plaintiff had produced sufficient evidence to show that the defendant's lack of due care in administering the anesthesia was the *probable* cause of the death. The defendant excepted and appealed. The supreme court held:

> [W] here the injury is a natural and probable result of the negligence charged, a wrongdoer cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done.

Boucher, 74 N.H. at 435, 68 A. at 871.

The New Hampshire Supreme Court has drawn a clear distinction between the effect of evidence that shows the plaintiff's injuries were *probably* caused by the defendant's negligence, and evidence that suggests the plaintiff's injuries were *possibly* caused by factors other than the defendant's conduct. The court has described this as the difference between reasonable deduction and simple conjecture. Consequently, the court has held that the mere *possibility* that the defendant's negligence did not cause the plaintiff's injuries is not enough to meet a *probability* that the defendant's negligence did cause the plaintiff's injuries. *Saad v. Papageorge*, 82 N.H. 294, 295, 113 A. 24, 25(1926).[1]

In the present case, as was true in *Crawford*, the respondents offered no evidence to bolster or corroborate their expert's opinions that there may have been other possible causes of the petitioner's injuries. The medical records contain nothing that suggests that the initial perforation could have been caused by the anesthesiologist or by any other cause. The respondents offered no witnesses from the operating room who could testify that they observed the anesthesiologist cause the initial tear. Conversely, the petitioner had ample evidence to bolster the opinion of her medical expert who stated within a reasonable medical *probability* that the cause of the initial tear in Mrs. Wilder's esophagus was the negligent mobilization of her esophagus by Dr. Eberhart. Using diagrams drawn by Dr. Eberhart, and testimony from Dr. Eberhart and Dr. Weinstein, the petitioner proved the several steps of the operation, including mobilization of the esophagus. The petitioner showed the jury how Dr. Eberhart had to pass a right angle clamp around and behind the area of injury after cutting the surrounding connective tissue to facilitate mobilization. The evidence disclosed that it was Dr. Eberhart's hands and no one else's which performed the mobilization procedure and passed the right angle clamp around and behind the esophagus. Dr. Weinstein

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[1] Note: portions of the text of the official opinion are omitted in the Atlantic Reporter. See New Hampshire Reports for complete text.

testified that Dr. Eberhart would not have perforated the esophagus if he had mobilized that organ within the accepted standards of medical care. From that evidence the District Court found that the jury could properly conclude that the petitioner's injury was a natural and probable result of the negligence charged.

Before ruling on the petitioner's Second Motion in Limine, the District Court heard the testimony of Dr. Eberhart and was apprised of what Dr. Weinstein's testimony would be. The court also knew the respondents offered no other evidence to support their experts' opinions about other possible causes of the petitioner's injuries. Thus, the court ruled that the respondents' experts' opinions relating to other possible causes would be unduly prejudicial and confusing to the jury. This ruling is in accord with FRE 401, 402 and 403. The petitioner submits that since there is no evidence in the record which could support or corroborate the respondents' experts' opinions, such testimony cannot be material. In addition, since New Hampshire law provides that the bare possibility that something other than the tortfeasor's conduct may have caused the plaintiff's injuries is not sufficient as a matter of law to rebut the plaintiff's prima facie case, the District Court's ruling excluding the respondents' experts' opinions on other possible causes of the plaintiff's injuries was a proper exercise of the trial court's discretion and was in accord with New Hampshire law.

Nevertheless, the Court of Appeals ruled that the District Court's ruling on the petitioner's Second Motion in Limine was a clear abuse of discretion. The Court of Appeals cited no New Hampshire law in support of this conclusion. The court held that "this [ruling] effectively shifted the burden *somewhat* to the defendant, because now he had to prove more probably than not, that another cause, not manipulation was the cause of Mrs. Wilder's injury." (Emphasis added, Appendix A, page 5). Leaving aside the fact that the burden of proof with respect to the issue of causation cannot be shifted in degrees, the Court of Appeals cited the New Hampshire case of *Tzimas v. Coiffures by Michael*, 135 N.H. 498, 606 A.2d 1082 (1992) as authority for the proposition that in a tort case, while the defendant must discredit the plaintiff's evidence, he need not dis-

prove causation. The petitioner submits that *Tzimas* does not stand for that proposition. What is even more troubling is that the Court of Appeals seemed to ignore the petitioner's argument in her brief and at oral argument, as well as the pertinent New Hampshire case law as though it did not exist. The Court of Appeals' decision in this case is also an apparent contradiction to its decisions in *Willey v. Ketterer*, 869 F.2d 648 (1st Cir. 1989), another medical malpractice case tried in the District Court for the District of New Hampshire before Judge Loughlin, and *Larue v. National Union Electric Corp.*, 571 F.2d 51 (1st Cir. 1978). For these reasons, the petitioner submits that the Court of Appeals has violated the requirements of the *Erie* doctrine in this case. The results of that violation have caused undue and extreme prejudice to the petitioner, and will have further unduly prejudicial consequences to many other New Hampshire medical malpractice plaintiffs who try their cases in either the state or federal court systems.

In her brief and at oral argument the petitioner attempted to illustrate the distinction between shifting the burden of proof and shifting the burden of production under New Hampsire law. The petitioner's argument was that unless the respondents can show that the petitioner's injury *probably* did not occur as a result of the respondents' negligence, then the respondents have failed to fulfill their burden of production, and hence, no error can be ascribed to the District Court's ruling on the petitioner's Second Motion in Limine. That is precisely the distinction which was illustrated by the New Hampshire Supreme Court in *Tzimas*. In that case, the court made it clear that while the defendant is never *required* to prove where or how the injury occurred, once the plaintiff has made out a prima facie case the burden of production then shifts to the defendant to show that the injury *probably did not* occur in such a way that would lead to the defendant's liability. *Tzimas*, 135 N.H. at 501, 606 A.2d at 1084. In the instant case, the respondents *elected* to attempt to prove that the initial tear in Mrs. Wilder's esophagus was due to the conduct of the anesthesiologist and not that of Dr. Eberhart. It was a strategic choice made by respondents' counsel. Once that choice was made, the respondents had to produce the quality of proof required under *Boucher, Crawford, Saad* and *Tzimas*. See also *Brann v. Exeter*

Clinic, Inc., 127 N.H. 155, 159, 498 A.2d 334, 337 (1985). Because the respondents did not do so, no error can be ascribed to the District Court's ruling on the petitioner's Second Motion in Limine.

Respondents' counsel and the Court of Appeals made much of the fact that petitioner's counsel misspoke at the bench conference concerning petitioner's Second Motion in Limine. (Appendix B, page1). There, counsel for Mrs. Wilder stated that the respondents' experts' theory of alternate causation amounted to an affirmative defense which shifted the burden of proof [sic] onto the defendants. Nevertheless, the point which petitioner's counsel wished to express was not lost upon Judge Loughlin who recognized petitioner's counsel's misstatement, and stated that the burden of proof did not shift to the respondents. (Appendix B, page 3). Throughout that bench conference, counsel for both sides and the trial court misspoke at different times—a common occurrence in the heat of trial. But both counsel and the trial court understood what the issue was and how the District Court ruled on it.

Upon appeal to the Court of Appeals, however, the respondents argued that their expert witnesses were prepared to testify that among a variety of possible causes of the petitioner's injuries the *most likely cause* was the passage of the Maloney dilator by the anesthesiologist. However, the respondents' experts were never prepared to state their opinions as a probability or likelihood. Their experts' reports and the respondents' offer of proof at trial (Appendix B, page 4) unequivocally reveal that these experts' opinions amounted only to a bare possibility and no more. This misstatement of the record was identified and criticized by Judge Loughlin in his December 31, 1992 Order of Recusal. (Appendix B, page 13). Nevertheless, the Court of Appeals adopted that characterization of the record, and on that basis set aside the verdict in favor of the petitioner, vacated the judgment of the District Court and remanded the case to the District Court for a new trial.

The petitioner respectfully submits that such an injustice should not be allowed to stand, particularly in light of the fact that it is based upon an interpretation of New Hampshire law which contradicts the true state of the law and upon an understanding of the

respondents' offer of proof which is contradicted by the record in several places. This, the petitioner submits, is clear error, and she requests this Court to vacate the Court of Appeals' judgment.

II

The Court of Appeals denied the petitioner's Petition for Rehearing, Suggestion for Rehearing In Banc and Motion for Certification of Questions to the New Hampshire Supreme Court in its order dated December 17, 1992. The Court of Appeals gave no reasons for its denial of petitioner's Petition for Rehearing and Suggestion for Rehearing In Banc. But in a three-paragraph order, the Court denied the petitioner's Motion for Certification of Questions to the New Hampshire Supreme Court because it was too late, and stated that granting the motion would amount to an appeal of the Court of Appeals' decision to the New Hampshire Supreme Court. However, the petitioner submits that because the District Court decided in her favor the issues raised by her Second Motion in Limine, and because the jury rendered a verdict in her favor, she cannot reasonably or fairly be criticized for not having asked the District Court to certify questions of law to be resolved by the New Hampshire Supreme Court.

In support of its decision denying the petitioner's Motion for Certification of Questions, the Court of Appeals cited *Croteau v. Olin Corporation*, 884 F.2d 45, 46 (1st Cir. 1989). However, that case is inapposite to the present case. In *Croteau*, the plaintiff presented a novel argument for the extension of state law to the District Court but did not request certification to the state supreme court. The District Court ruled in the defendant's favor and the plaintiff appealed to the Court of Appeals for the First Circuit. The Court of Appeals affirmed the decision of the District Court which, it noted, provided a reasonable and well-reasoned interpretation of New Hampshire law to which the Court of Appeals owed "some deference." Thus, unlike the petitioner in this case, the plaintiff in *Croteau* was unsuccessful at the District Court. Moreover, the Court of Appeals deferred to the District Court's interpretation of New Hampshire law which it described as "reasonable and well-reasoned." In the present case the

Court of Appeals rejected the District Court's interpretation of New Hampshire law, and for the reasons set forth in Part I of this argument, the petitioner submits that the Court of Appeals' interpretation of state law is seriously flawed.

This Court has stated that resort to the certification procedure rests in the sound discretion of the federal court. *Lehman Brothers v. Schein*, 416 US 386, 94 S Ct 1741, 40 L Ed 2d 215 (1974). However, this Court noted that the certification procedure "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." *Id.* at 391, 94 S Ct at 1744, 40 L Ed 2d at 220. Of this quote, it has been commented that "[i]ts enthusiastic language... can only encourage more frequent use of the procedure." 17A C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure 2d* §4248 at 164 (1988). The same authors have stated that "[t]here is no time limit on when certification may be sought." *Id.* §4248 at 13 (Supp. 1992).

Thus, the petitioner submits that the Court of Appeals' ruling that her Motion for Certification was too late has no basis in law or in the facts of this case. For that reason, the petitioner submits the Court of Appeals' decision on her Motion for Certification should be reversed.

III

The Court of Appeals' denial of the petitioner's Motion for Certification of Questions to the New Hampshire Supreme Court was not only a rejection of that remedy as a means to resolve the issues on appeal. The Court went much further and ruled that "certification is no longer the appropriate course either before us or *on remand to the District Court*." (Emphasis added, Appendix A, page 9). The petitioner submits that this ruling is so contrary to the judicial policies of the search for truth, the achievement of substantial justice and judicial economy, and so far departs from the accepted and usual course of judicial proceedings that it calls for an exercise of this Court's power of supervision.

New Hampshire Supreme Court Rule 34 provides that a federal court may certify questions of this state's law to the New Hampshire Supreme Court which may be determinative of the cause and when it appears to the certifying court that there is no controlling precedent in the decisions of the state supreme court. Because of the existence of the well-reasoned New Hampshire Supreme Court decisions previously cited in this argument, it did not occur to the petitioner or to the District Court that there was substantial doubt as to the controlling New Hampshire precedent on the issues raised by the petitioner's Second Motion in Limine. Consequently, neither the petitioner nor the District Court sought certification of these issues to the New Hampshire Supreme Court. The foreseeable need for certification did not arise until, much to the surprise of the petitioner and the District Court, the Court of Appeals issued its October 8, 1992 decision on appeal.

This Court has held that a Court of Appeals has a duty to make a meaningful de novo review of a District Court's determination of state law. *Salve Regina College v. Russell*, 499 US ____, 111 S Ct 1217, 113 L Ed 2d 190 (1991). In that case this Court ruled that:

> Independent appellate review necessarily entails a *careful consideration* of the District Court's legal analysis, and an *efficient and sensitive* appellate court at least will naturally consider this analysis in undertaking its review. (Emphasis added).

Id. at___, 111S Ct at 1221, 113 L Ed 2d at 198.

However, the Court of Appeals in this case did not follow this Court's mandate set forth in *Salve*. As pointed out in detail in Part I of this argument, the petitioner submits that the Court of Appeals ignored most of the pertinent New Hampshire case law on the issue on appeal, and misconstrued the one New Hampshire case which it cited in support of its decision. The petitioner submits that in so doing, the Court of Appeals violated the obligation of responsible appellate review as required by *Salve*, and the principles of a cooperative judicial federalism underlying *Erie*. This is reflected in particular by

the Court of Appeals' express reluctance to permit the New Hampshire Supreme Court to consider the issues in this case.

In support of its denial of the petitioner's Motion for Certification, the court stated that the petitioner's desire for "another day in court" is inappropriate. However, the Court of Appeals has remanded this case for a new trial in the District Court. The petitioner submits that it is obvious that the interests of judicial economy and the conservation of resources will be better served by certification (which may be determinative of the cause) than they will be by proceeding directly to a new trial. This Court's approval of the certification procedure is evident in *Schein*, 416 US at 390-391, 94 S Ct at 1743-1744, 40 L Ed 2d at 219-220, and in footnote 4 of this Court's decision in *Salve*, 499 US at ____, 111 S Ct at 1224, 113 L Ed 2d at 202.

Moreover, in *Salve*, 499 US at___, 111 S Ct at 1222, 113 L Ed at 199, this Court acknowledged the unchallenged superiority of the District Court's fact-finding ability pursuant to FRCP 52(a) which commands that a trial court's finding of fact shall not be set aside unless clearly erroneous. In this regard, the Court of Appeals gave little, if any, deference to the District Court when it ignored that court's finding that the respondents' experts were unwilling or unable to express their opinions of alternative causation to a likelihood or probability.

For these reasons, the petitioner submits that the Court of Appeals' ruling that her Motion for Certification may not be raised on remand constitutes clear error, and, therefore, should be reversed.

CONCLUSION

The Court of Appeals erred by not applying the substantive state law in this case contrary to the *Erie* doctrine. That error led the Court of Appeals to set aside the jury verdict in favor of the petitioner, thereby resulting in extreme and undue prejudice to her. The law of this case as declared by the Court of Appeals contradicts current New Hampshire case law, and this will likely produce undue prejudice to

other plaintiffs in similar cases until this confusion is eliminated.

The Court of Appeals erred in denying petitioner's Motion for Certification of Questions to the New Hampshire Supreme Court on the grounds of lateness. The petitioner filed her Motion for Certification as soon as the reasonable need for that remedy materialized. The Court of Appeals erred further by prohibiting the District Court and the petitioner from seeking certification before proceeding to a new trial, and did so without providing careful and sensitive de novo review of state law as required by this Court in *Salve*, and without giving due deference to the District Court's findings of fact pursuant to FRCP 52 (a).

The petitioner respectfully requests this Court to issue a writ vacating the Court of Appeals' judgment and reinstating the verdict in favor of the petitioner, or, alternatively, order that the issues of state law be certified to the New Hampshire Supreme Court for resolution, or, alternatively, set the matter for hearing and argument so that this Court can review the issues herein in further detail.

Respectfully submitted,

March 12, 1993

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 92-1274

SANDRA G. WILDER,

Plaintiff, Appellee,

v.

WARREN F. EBERHART, M.D., AND
CONCORD CLINIC, INC.,

Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Martin F. Loughlin, Senior U. S. District Judge]

Before

Torruella and Stahl, Circuit Judges,

and Hornby, * District Judge.

Robert M. Larsen, with whom William D. Pandolph and Sulloway Hollis & Soden, were on brief for appellants.

John Pierce Kalled, with whom Douglas P. Hendrickx and

Kalled Law Offices, were on brief for appellee.

October 8, 1992

* Of the District of Maine, sitting by designation.

TORRUELLA, Circuit Judge. Doctor Warren F. Eberhart, ("Dr. Eberhart") appeals an adverse judgment rendered in this medical malpractice action, stemming from a suit filed by his former patient Sandra Wilder ("Ms. Wilder"). On appeal, Dr. Eberhart raises the issue of whether the district court committed reversible error in excluding and/or limiting rebuttal expert testimony to that which could be expressed quantifiably in terms of "probability." Because we agree with Dr. Eberhart, that the district court erred in limiting his defense expert's testimony, we vacate the judgment and remand for a new trial.

BACKGROUND

On May 21, 1985, Ms. Wilder, a Vermont resident, saw Dr. Eberhart in his Concord New Hampshire office for consultation regarding Ms. Wilder's obesity and the medical options available to control her weight problem. Following the consultation, Dr. Eberhart determined that Ms. Wilder was a candidate for a vertical banded gastroplasty ("VBG") or vertical stapling of the stomach. Ms. Wilder was admitted to the Concord Hospital on June 11, 1985, under the care of Dr. Eberhart. The following day, June 12, 1985, Dr. Eberhart performed the VBG on Ms. Wilder. The procedure went uneventfully until near the end when Dr. Eberhart noticed a 3 to 3.5 centimeter tear in Ms. Wilder's lower esophagus. The tear was repaired by suturing the tear and then suturing a fold of the gastric tissue around the tear site for additional support—a procedure known as a Nissen fundoplication. Following the operation, Ms. Wilder was sent to the recovery room.

On the following day, June 13, 1985, Dr. Eberhart determined that there was still leakage at the lower esophagus. He operated again that same day and discovered two tears in Ms. Wilder's lower esophagus. The tears were repaired. On June 20, 1985, Dr. Eberhart decided to operate again when an X-ray revealed that the lower esophagus and upper stomach were not healing properly. During the operation, it was discovered that the lower esophagus and upper stomach were no longer viable. Thus Dr. Eberhart removed that dead tissue and sewed the upper side of the stomach closed. The remainder of the stomach was reconnected to the esophagus. Eventually, Ms. Wilder was transferred to the Dartmouth-Hitchcock Medical Center, where she remained hospitalized for 101 days until her release in November of 1985.

Ms. Wilder filed this diversity suit in the United States District Court for the District of New Hampshire against Dr. Eberhart and the Concord Clinic alleging amongst other things negligence on behalf of Dr. Eberhart in mobilizing the esophagus during surgery, causing her recurring esophageal injury. A jury awarded Ms. Wilder $685,000 in damages.

The Trial

I. Expert Testimony

Dr. Saul Frank Weinstein ("Dr. Weinstein"), a general surgeon from Philadelphia, testified via video deposition as plaintiff's expert. Dr. Weinstein categorically ruled out any possibility that instrumentation could have caused the injury to Ms. Wilder's esophagus. Further, he concluded without reservation that the sole cause of the esophageal injury was mobilization of the esophagus by Dr. Eberhart during the VBG procedure.

On the fourth day of trial, three days after the video deposition of Dr. Weinstein was presented, the defendants were prepared to introduce their expert witnesses, Dr. David J. Sugarbaker ("Dr. Sugarbaker"), Assistant Professor of Surgery at Harvard Medical School and Chief of Thoracic Surgery at Brigham and Women's Hospital, and Dr. Edward Mason ("Dr. Mason"), the developer of the

VBG technique. Both were prepared to testify that other "possible" causes of the esophageal injury[1] existed. Just moments before Dr. Sugarbaker's testimony, Ms. Wilder's counsel filed a Second Motion in Limine seeking to exclude any opinion testimony by defendants' experts that could not be expressed in terms of "probability" as distinguished from "mere possibility."

Ms. Wilder's counsel argued that by presenting evidence of particular possible causes of the injury, defendant was raising an affirmative defense which shifted the burden to Dr. Eberhart to prove that another cause, other than manipulation of the esophagus during surgery, was more probably than not the cause of the tears to the esophagus. Defense counsel argued that it was entitled to put on testimonial evidence to the effect that no one, including Ms. Wilder's expert, Dr. Weinstein, should be able to say more probably than not the cause of the tears to the esophagus was manipulation or mobilization of the esophagus. Defense counsel also argued that the burden of proof regarding causation did not shift to the defense, and further, that defense experts were entitled to testify as to other possible causes of the esophagus tears in rebuttal of the claims made by plaintiff's witnesses.

STANDARD OF REVIEW

Generally, the decision whether or not to admit expert testimony is a matter within the sound discretion of the trial judge. Int'l

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[1] Defendants' experts were to testify as to each possible cause of Ms. Wilder's esophageal tear. Moreover, the experts were going to rank the possibilities in order of likelihood, reflecting the most likely causes. Out of this ranking, the defendants' experts would conclude that the most likely cause of Ms. Wilder's injury was the passage and manipulation by the anesthesiologist of certain instruments - - the Nasogastric tube or the Maloney dilator - - through or in the esophagus, and correspondingly, that the least likely of the possible causes was mobilization of the esophagus by Dr. Eberhart.

Adhesive Coating Co., Inc. v. Bolton Emerson Int'l, 851 F.2d 540, 544 (1st Cir. 1988) (citing Lynch v. Merrell-National Laboratories, 830 F. 2d 1190, 1196-97 (1st Cir. 1987)); 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 703 [1], at 703-04 (1987)). The trial judge's decisions will not be disturbed absent a clear abuse of that discretion or an error of law. Id. (citing DaSilva v. American Brands, Inc., 845 F.2d 356, 361 (1st Cir. 1988)). We find that the trial judge committed clear error in prohibiting defendant's experts from testifying as to other possible causes in rebuttal of Dr. Weinstein's testimony, and thus we vacate and remand the case for a new trial.

DISCUSSION

Plaintiff's Second Motion in Limine cited Emerson v. Twin State Gas and Electric Co., 174 A. 779 (N.H. 1934), for the proposition that "the opinion testimony of a physician is admissible if stated within reasonable medical probability." In granting plaintiff's Second Motion in Limine to limit the testimony of Drs. Sugarbaker and Mason, the trial judge agreed with the defendants that the burden of proof did not shift, yet he cited Bentley v. Adams, 128 A.2d 202 (N.H. 1956) and Brann v. Exeter Clinic, Inc., 198 A.2d 334 (N.H. 1985), concluding that to admit testimony of possibilities would result in "reversible error." (Tr. Vol. 4 p. 52). This effectively shifted the burden somewhat to the defendant, because he now had to prove more probably than not, that another cause, not manipulation, was the cause of Ms. Wilder's injury. Besides finding that these cases stand for other principles inapplicable to the facts presented by this case,[2] our review of applicable case law leads us to but one conclusion; that the trial court committed a clear error of law in excluding defendants' expert rebuttal testimony.

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[2] These cases generally refer to the plaintiff's burden of proof; that the plaintiff must prove his case within a reasonable degree of medical certainty. They are silent as to whether or not a defendant in a medical malpractice action or any negligence action may present "possibility" evidence when rebutting plaintiff's "probability or certainty" evidence.

It is well settled under New Hampshire law that the burden of proof with respect to causation in a medical malpractice case rests and remains with the plaintiff. Pillsbury-Flood v. Portsmouth Hospital, 512 A.2d 1126, 1129 (N.H. 1986). Moreover, proximate causation between negligence and the injury complained of in a medical malpractice case must be established by expert testimony. Martin v. Wentworth-Douglass Hospital, 536 A.2d 174, 176 (N.H. 1987). On the other hand, the defendant need not disprove causation. Rather, he must produce credible evidence which tends to discredit or rebut the plaintiff's evidence. Tzimas v. Coiffures By Michael, 606 A.2d 1082, 1084 (N.H. 1992). As the New Hampshire Supreme Court recently stated in Tzimas, the plaintiff in a negligence action bears the burden of producing evidence "to prove that it is more likely than not that [plaintiff's] injury was" caused by the defendant's negligence. Tzimas, 606 A.2d at 1084. Defendant need not prove another cause, he only has to convince the trier of fact that the alleged negligence was not the legal cause of the injury. Id. In proving such a case, a defendant may produce other "possible" causes of the plaintiff's injury. These other possible causes need not be proved with certainty or more probably than not. To fashion such a rule would unduly tie a defendant's hands in rebutting a plaintiff's case, where as here, plaintiff's expert testifies that no other cause could have caused plaintiff's injury. The burden would then shift and defendant would then bear the burden of positively proving that another specific cause, not the negligence established by plaintiff's expert, caused the injury. Certainly, this is much more than what should be required of a defendant in rebutting a plaintiff's evidence.

Were we to accept plaintiff's argument that once a plaintiff puts on a prima facie case, a defendant cannot rebut it without proving another cause, the resulting inequities would abound. For example if ninety-nine out of one hundred medical experts agreed that there were four equally possible causes of a certain injury, A, B, C and D, and plaintiff produces the one expert who conclusively states that A was the certain cause of his injury, defendant would be precluded from presenting the testimony of any of the other ninety-nine experts, unless they would testify conclusively that B, C, or D was the cause of injury. Even if all of defendant's experts were prepared to testify that any of the possible causes A, B, C or D, could have equally caused

plaintiff's injury, so long as none would be prepared to state that one particular cause, other than that professed by plaintiff more probably than not caused plaintiff's injury, then defendant's experts would not be able to testify at all as to causation. We think that such a result does not reflect the state of the law in New Hampshire, and furthermore would be manifestly unjust and unduly burdensome on defendants.

Under the circumstances of this case, Dr. Eberhart was prejudiced by the granting of the Second Motion in Limine, and this prejudice constituted reversible error. Thus, the judgment in favor of plaintiff is vacated and remanded for a new trial.

Vacated and remanded.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1274

SANDRA G. WILDER,
Plaintiff, Appellee,

v.

WARREN F. EBERHART, M.D., AND
CONCORD CLINIC, INC.,
Defendants, Appellants.

Before

Torruella and Stahl, Circuit Judges,
and Hornby, District Judge.

ORDER OF COURT

Entered December 17, 1992

Appellee's motion for certification of questions to the New Hampshire Supreme Court is denied.

Appellee never requested certification from the district court. It is now too late. Now that she received an unfavorable decision, she wants another day in court. We are under no obligation to provide appellee with what would amount to an appeal of our decision to the New Hampshire Supreme Court. See Croteau v. Olin Corp., 884 F.2d

45, 46 (1st Cir. 1989). Certification is no longer the appropriate course either before us or on remand to the district court.

In the present case, the defendant desired to produce evidence that there were other causes for the injury that were more likely than the cause that the plaintiff offered. He did not request judgment as a matter of law. He simply wanted the jury to hear all of the evidence, as is their job. The evidence was fully admissible, at the very least, on a credibility basis because plaintiff's expert had said that there was only one probable cause for this injury and he excluded all others. Under those circumstances, the jury was entitled to hear from the expert who devised the operation, that other causes did exist which were equally as probable as that postulated by the plaintiff's expert even though on a probability basis the expert could not say which cause was the more probable.

Motion denied.

By the Court:
Francis P. Scigliano
Clerk.

[cc: Messrs. Larsen and Kalled]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1274

SANDRA G. WILDER
Plaintiff, Appellee,

v.

WARREN F. EBERHART, M.D.
CONCORD CLINIC, INC.
Defendants, Appellants

ORDER OF COURT

Before

Breyer, Chief Judge,
Torruella, Selya, Cyr,
Boudin, Stahl, Circuit Judges,
and Hornby*, District Judge.

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the Judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Clerk.

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*of the District of Maine, sitting by designation.

[cc: Messrs. Larsen and Kalled]

APPENDIX B

MR. KALLED: I just object, your Honor, to the defendants putting in any evidence, opinion evidence by the physicians about causation or standard of care that is not supported by an opinion of probability, reasonable medical probability. The defendant is certainly permitted to have his witnesses discuss in a general medical sense what the field of medicine and surgical risks are in a given surgical theater. However, with respect to the particular events and the particular medicine that applies to this client, if they offer opinions about what caused the problem or who caused the problem they have then gone into a new territory. They have then gone into an affirmative defense defending against the plaintiff's claims of malpractice by offering an argument of alternative causation, and when they do that the burden of proof [sic] shifts to the defendant.

THE COURT: All right. One, that's the beauty of cross-examination, and you're going to have that opportunity. Two, Brother Larsen did not get into anything pertaining to the Maloney dilator as being causation or the Penrose drain, and of course he's going to have something more to say on that. And three, and I'm not being critical, but this should be a lesson to you. The next time you have a malpractice case on this join everybody. The anesthetist, the whole works. But I'm not going to let him blame the anesthetist. And, Bob, I have some case law.

MR. LARSEN: If I can just state my position on the plaintiff's Second Motion in Limine. I want to make an offer of proof to the Court first, it is our experts' opinion in this case that no one can precisely determine the cause of this perforation of the esophagus, meaning that they do not believe that anyone, including Dr. Weinstein, should be able to say that more probably than not the cause was manipulation or mobilization of the esophagus.

I believe it to be relevant and probative for our experts to challenge Dr. Weinstein's opinions in this regard. I think our experts can do that one of two ways: by saying they disagree with him, that

no one knows for sure, and that there are numerous possibilities as to what the cause could be. And indeed, Dr. Sugarbaker, although he was not asked directly, he indicated that instrumentation is one of the potential causes. And she may have been predisposed for that here. We are into this issue in this case.

The issue of possible cause is central to my defense of this case. It is not my burden to prove more probably than not that the cause was one thing or another. My Brother confuses his burden with my obligation under the rules to offer evidence which is relevant and probative. There is no burden shifting under New Hampshire law. There are cases on that. The burden in a medical malpractice case never shifts to the defendant at any time. I am not about to prove in this case more probably than not that the cause was one thing or another. I simply want to introduce evidence which raises questions about possible causes. I believe that to be relevant, I believe it to be probative, and I believe that I should be able to get into it.

And as I indicated, your Honor, I think we're already into this. He interjected the issue of other ways of causing injury to the esophagus when he went after my client with this article, the Sabiston article, which has a table in it, your Honor, which lists the possible causes of esophageal perforation. So I think it's important to our case, I think we're into it, and I think finally that the motion, Motion in Limine is not based on a correct reading of New Hampshire law.

THE COURT: Well, I'm going to stick by my off-the-record comments, but at the time I did not have the case law at hand. And the case, I think the leading case on this is Bentley vs. Adams. I think it was Judge Grant who got reversed on that one. 100 N.H. 377.

There's another case more recent, Brann vs. Exeter Clinic, 127 N.H. 155.

And what I think maybe we're misconstruing, not you, but I think we may be misconstruing, Bob, that Pillsbury-Flood vs. Portsmouth Hospital case in 128 N.H. 299 in which our Supreme Court rejected the Hicks case saying the burden of proof has to shift to the

defendant. I'm not saying the burden of proof has shifted.

MR. LARSEN: I know you're not, your Honor. I understood him to say as an additional argument that the burden of proof shifts.

THE COURT: I think he's misconstruing that case.

MR. LARSEN: But if I can't attack Saul Weinstein on this point it's essentially to put a kerchief around my mouth, because I can't offer evidence. My doctors will say that among the possibilities ...

THE COURT: When you say your doctors, you mean Dr. Mason and Dr. Sugarbaker?

MR. LARSEN: Yes, will say that among the possibilities, and they've already gotten into this, that the cause of this perforation is instrumentation. And, indeed, among the possibilities they believe that instrumentation is the most likely possibility. They cannot say that that is for certain the cause. And why is that so?

THE COURT: Can I interrupt for a minute, please? Instrumentation. Are you saying the anesthetist or the defendant?

MR. LARSEN: You know, I'm going to address that. I am not blaming the anesthetist in this case. I didn't open that way and I'm not trying that. Indeed, your Honor, my own client doesn't blame them. He says he doesn't think it was the Maloney dilator. You know, we've been into possibilities in this case already. He was asked the question. He said what do you think the cause was. He said, well, there are some possibilities.

MR. KALLED: It was in deposition.

MR. LARSEN: You asked this question in the courtroom. There are possibilities, including the Maloney dilator and the NG tube. But he said I don't think those are the likely causes. Well, I've got two experts in this courtroom who believe that the Maloney dilator <u>was probably the cause</u> of that perforation. (Emphasis added).

MR. KALLED: No, they don't believe probably.

THE COURT: No, they don't, and that's the magic word unfortunately. It might seem ludicrous, but that's the word.

MR. LARSEN: I misspoke. I mean among the possibilities. And I can't put it any more succinctly than that. (Emphasis added).

THE COURT: No, I think you have.

MR. LARSEN: I think I am being held to the standard of burden of proof which is not mine. There's no question in New Hampshire that the burden of proof is on the plaintiff not with respect to standard of care, but only with respect to causation, John. Your burden is to prove more probably than not the cause.

MR. KALLED: I accept that burden, but when you offer alternative causation theories, then you've gone beyond simply opening the door...

THE COURT: John, if I let that in, Bob, possibilities, the distinction with the jury, it's a matter of semantics and it's a penumbra and it's a fine line. If I let that in they're damn well going to find, may find for the defendant and you're going to get reversible error, and I don't want to try this thing again.

MR. LARSEN: Would you agree with me that at least the experts can talk about the possible causes of injury, but not to assign...I mean I think what you're, the point where you're hung up is arguing that among the possibilities that some are more likely than others.

THE COURT: If they say that, that's the magic word.

MR. LARSEN: Okay.

MR. KALLED: What's that?

THE COURT: If they say more likely than otherwise or more possible, [sic] that's the magic word. I didn't make these rules and I'm not going to blow this case.

MR. KALLED: Right. But they can't say more probable among a bunch of possibles. That's piggybacking.

MR. LARSEN: I'm not going to ask them that. I just did this with Sugarbaker. No one objected.

MR. KALLED: You didn't do that.

MR. LARSEN: I said what are the possible causes of injury to the esophagus and he listed them.

MR. KALLED: That's general.

THE COURT: That's general.

MR. KALLED: That's not to my client.

THE COURT: Look, let me put it succinctly. I like that word too. You get into probabilities, it's admissible. You get into possibilities, it's inadmissible. I think your record is complete.

APPENDIX B

THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Sandra Wilder

v. #C-89-091-L

Warren F. Eberhart, M.D. and
Concord Clinic

ORDER

The instant action involves a medical malpractice suit against defendant, a New Hampshire surgeon. On May 21, 1985, the plaintiff saw defendant at his office at the Concord Clinic. At the time of the office visit, plaintiff was severely overweight and desired surgery to control her obesity. Defendant concluded she was a candidate for gastric surgery.

Plaintiff was admitted to the Concord Hospital on June 11, 1985 under the care of defendant. On June 12, 1985, defendant performed a vertical banded gastroplasty, or vertical stapling of the stomach. During this procedure, a hole was discovered in plaintiff's esophagus and was repaired.

Subsequently, it was determined that the tears in the esophagus had reopened and plaintiff was returned to the operating room on June 13, 1985 for an esophagoplasty. On June 20, 1985, plaintiff became diaphoretic, weak and complained severely of upper abdominal pain. Upon examination, bright red blood was noted in the NG tube and at the penrose drain sites. A Gastrografin swallow showed leakage at the esophageal junction. The patient was returned to the operating room on June 20, 1985 for an esophagogastroscopy.

On June 25, 1985, plaintiff was transferred from the Concord Hospital to the Dartmouth Hitchcock Hospital, where she remained

until October 3, 1985.

On February 28, 1989, plaintiff commenced an action in this court alleging, in various counts, substandard care on the part of defendant. A trial before this court commenced on December 4, 1991. On December 12, 1991, the jury returned a general verdict against the defendants awarding plaintiff damages in the amount of $685,000.00.

Pending before the court are defendants' renewed motion for judgment as a matter of law, motion for a new trial, and motion for remittitur.

Discussion

Defendants move for a new trial, pursuant to Rule 59, Fed. R. Civ. P., and ask for judgment as a matter of law, in accordance with the provisions of Rule 50, Fed. R. Civ. P. Defendants object to the jury verdict entered December 12, 1991, awarding $685,000.00 in damages to plaintiff. Defendants claim there were errors of law made at the trial in the form of admissions and exclusions of evidence; the verdict was excessive; and there were omissions in the charge to the jury. Defendants also claim there was insufficient evidence to support the jury's finding that defendants were negligent and urge this court to grant their motion for judgment as a matter of law.

Whether the evidence is sufficient to create an issue of fact for the jury is solely a question of law to be determined by the court. Roche v. New Hampshire National Bank, 192 F.2d 203 (1st Cir. 1951); 9 C. Wright & A. Miller, Federal Practice and Procedure: Civil §2524 (1971). "Since grant of [judgment as a matter of law] deprives the party of a determination of the facts by a jury, they should be cautiously and sparingly granted." Id.

The principles governing the consideration of a motion for judgment as a matter of law are well settled in the First Circuit: "[t] he evidence must be viewed in the light most favorable to plaintiff, giving [plaintiff] the benefit of every favorable inference that may be fairly drawn. If fair minded [people] may draw different inferences

and reasonably disagree as to what the verdict should be, the matter is for the jury." Valedon Martinez v. Hospital Presbiteriano, 806 F.2d 1128, 1134 (1st Cir. 1986) (citations omitted). "The rule in this circuit remains that a scintilla of evidence is insufficient." Magnat Corp. v. B & B Electroplating Co., 358 F.2d 794, 797 (1st Cir. 1966). Defendants have failed to meet the standard which would compel us to grant judgment as a matter of law under Rule 50. Viewing the evidence in the light most favorable to plaintiff, this court finds that plaintiff presented sufficient evidence to support the jury's finding that the defendants were negligent.

Defendants contend there was insufficient evidence to support the jury's finding of negligence and this court should, therefore, grant their motion for a new trial. In ruling on a motion for a new trial, the court may weigh the evidence before it. Insurance Co. of North America v. Musa, 785 F.2d 370, 375 (1st Cir. 1986). Although the granting or denial of the motion lies almost exclusively within the discretion of the trial judge, the exercise of that discretion is limited by respect for the jury: "a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury..." 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil §2806 (1973). Additionally, "[c]ourts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial." Id., §2803. Defendants have failed to meet the burden which would compel us to grant a new trial under Rule 59, since they have shown no harmful or prejudicial error.

Defendants allege that plaintiff did not present any expert testimony regarding causation. The general rule in New Hampshire is that proximate causation between negligence and injury in a medical malpractice case must be established by expert testimony. Martin v. Wentworth-Douglass Hospital, 130 N.H. 134, 136 (1987). Plaintiff relied on the testimony of Dr. Saul F. Weinstein to establish causation. Dr. Weinstein testified that the initial 3.5 centimeter tear in plaintiff's esophagus, as well as the resulting loss of the lower end

of her esophagus and the upper part of her stomach, were caused within a reasonable medical probability by the substandard medical practice of Dr. Eberhart. Plaintiff's witness Dr. Crichlow testified that he treated plaintiff for problems which had resulted from her three surgeries by Dr. Eberhart.

Defendants contend that the court erred in failing to give requested jury instructions regarding vicarious liability, intervening cause, "unfortunate results", and "mere error."

Defendants' proposed instructions regarding "unfortunate results" and "mere error" were substantially similar to the following instruction which this court gave: "[a] physician is not legally liable for decisions based on his clinical judgment which might not be shown to have been wrong unless those decisions were made without reasonable skill or diligence. Medicine is not an exact science. Doctors and hospitals do not guarantee a perfect result because they undertake to treat a patient."

Defendants' proposed instructions regarding vicarious liability and intervening cause were not erroneously omitted from the charge. Plaintiff's second motion in limine was granted precisely because it sought to exclude testimony improper under New Hampshire law regarding causation and standard of care. "Causation is a matter of probability, not possibility." Pillsbury-Flood v. Portsmouth Hospital, 128 N.H. 299, 305 (1986) (citations omitted).

In New Hampshire, the opinion testimony of a physician is admissible if stated within reasonable medical probability. Emerson v. Twin State Gas & Electric Co., 87 N.H. 108, 112 (1934). Testimony regarding mere possibilities is inadmissible. Id. Therefore, it was proper for the court to order that the defendants' expert witnesses, Drs. Mason and Sugarbaker, were not permitted to give opinions regarding causation or standard of care unless those opinions were stated within a reasonable medical probability.

In a medical malpractice action, "proof" does not mean demonstration to an absolute certainty. Boucher v. Larochelle, 74

N.H. 433, 434 (1908). The plaintiff "was required only to make it more probable than otherwise that the fact was as he claimed it. The rule... that the jury cannot be permitted to determine by guess or conjecture between two equally probable causes of an injury, for one only of which the defendant is responsible, has no application unless the existence of a sufficient cause or causes for the injury, aside from the negligence charged, is conceded or conclusively proved." Boucher, 74 N.H. at 434 (citation omitted). Reviewing the record, the court is satisfied that plaintiff did provide sufficient evidence on the proffered probable cause of the injury, namely defendant physician's negligence, so that a reasonable jury could find for plaintiff.

The defendants contend that the verdict is excessive in that it includes elements of damages not properly before the jury. Testimony at trial by plaintiff and supporting medical witnesses presented substantial and convincing evidence that plaintiff suffered the injuries claimed, that the injuries were caused by defendants' negligence, and that plaintiff has suffered as a result of such negligence. If this court determines that the verdict is excessive, it can order a new trial or a new trial on the issue of damages alone. Kassel v. Gannett Co. Inc., 875 F.2d 935, 953 (1st Cir. 1989) (citations omitted).

In New Hampshire, it is assumed that pain and suffering is a very material element of damages in tort cases. Duguay v. Gelinas, 104 N.H. 182, 185 (1962). There is no exact or mathematical rule by which such damages can be determined. Id. (citation omitted). "Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the judge can, in his instructions, give the jury no standard to go by; he can only tell them to allow such amount as in their discretion they may consider reasonable.

Rules devised for measuring pecuniary losses do not fit here." Id. (citation omitted). Therefore, it was within the jury's discretion to award the plaintiff an amount which they considered reasonable.

The First Circuit has stated that "[a] verdict should stand

unless it is 'grossly excessive,' 'inordinate,' 'shocking to the conscience of the court,' or 'so high that it would be a denial of justice to permit it to stand.'" Segal v. Gilbert Color Systems, Inc., 746 F. 2d 78, 80-81 (1st Cir. 1984) (citations omitted). Upon examination of the trial record and the applicable law, this court finds that the weight of the evidence supported the jury's verdict, and that the amount awarded to the plaintiff was not so excessive as to shock the conscience of the court.

Conclusion

The New Hampshire law regarding medical malpractice actions supports plaintiff's contentions that defendants are liable in damages for injuries to which defendants' negligence contributed. Sufficient causation between negligence and injury has been shown, and the fact that the injury might reasonably be attributable to factors other than the defendants's negligence is not a bar to a verdict for the plaintiff. The contentions regarding the improper admission of rejection of testimony at trial have been discussed, supra. The verdict was not so excessive as to be against the weight of the evidence, nor shocking to the conscience of the court, nor clearly revealing errors of law.

Therefore, the defendants' motions are denied, and the jury's verdict will stand.

Martin F. Loughlin
Senior Judge

(February 11, 1992)
February 13, 1992

John P. Kalled, Esq.
Robert M. Larsen, Esq.

APPENDIX B

THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Sandra G. Wilder

v. #C-89-091-L

Warren F. Eberhart, M.D.
and Concord Clinic

ORDER OF RECUSAL

The court after much soul searching and deliberation recuses himself from any further participation in this case for the following reasons.

Since the decision setting aside the verdict on October 8, 1992 and remanding the case for a new trial other events have transpired and without vaticinating may question my objectivity or lack of objectivity in this case from defendants' perspective.

At a panel discussion held at the annual First Circuit Conference in Puerto Rico in November, a topic for discussion was "What is Wrong With The First Circuit Court of Appeals?" The tenor of the topic of course I had assumed would be constructive in nature. In retrospect perhaps I had the effrontery and temerity to discuss this case because I believed and still believe that it is a wrong interpretation of New Hampshire law and will have dire consequences. For this I apologize. Apparently there was a misunderstanding between myself and Judges Torruella and Stahl, as I understood that on a remand I could transfer the case to the New Hampshire Supreme Court. This avenue was foreclosed by the First Circuit by order entered on December 17, 1992 and I quote. "Certification is no longer the appropriate course either before us or on remand to the district court." This was the quietus. The order unequivocally means that the

case will have to be retried. A transfer to the New Hampshire Supreme Court had the distinct possibility of reinstating the jury verdict thus obviating a retrial. See Coffran v. Mary Hitchcock, 683 F.2d 5 (1st Cir. 1982) regarding wasting of judicial time. Secondly, and perhaps more importantly the issue involved is stare decisis as far as the Federal Court is concerned and of course will have an impact upon New Hampshire State Court practices.

Also in the order of December 17, 1992 is the following and I quote, "In the present case, the defendant desired to produce evidence that there were other causes for the injury that were more likely than the cause that the plaintiff offered." There is nothing in the trial record by offer of proof or otherwise that any of the defendants' four doctors would have testified that their testimony was in the aegis of likelihood. If there had been such offer of proof this court is conversant enough with the language in Brann v. Exeter Clinic, 127 N.H. 155, 159 (1985) that any or all of defendants' doctors would have been permitted to testify as to likelihood. Another assertion is that the evidence was fully admissible, at the very least, on the issue of credibility. The Court does not believe that defendants' counsel ever elicited credibility as an issue for admissibility. Objections not proffered at the trial court level are not grounds for appellate appeal. G. D. v. Westmoreland, 930 F.2d 942, 950 (1st Cir. 1991).

To recapitulate Mrs. Wilder was seriously injured, is practically indigent, will be faced with the costs of a new trial and will also once again encounter four renown experts in the field of vertical banded gastroplasty, without being ludicrous or mordant, seemingly could testify that possibly a minor earthquake barely perceptible on the Richter scale caused the tear in her lower esophagus while she was in the operation room.

Lip service was not adhered to the law as set forth in Russell v. Salve Regina College, 890 F.2d 484 (1st Cir. 1989) and quoting "Customary appellate deference is accorded to interpretations of state law made by federal judges of that state." This judge in addition to thirteen years, nine months on this court served approximately sixteen years on the New Hampshire Superior Court and while Chief

Justice resigned to become a judge of this court. The judge has also sat on the New Hampshire Supreme Court pursuant to RSA 490:3 II.

The media is replete with articles about high malpractice costs causing a crisis in our courts. There is another side of the coin which receives very little media attention. The difficulty of a plaintiff like Mrs. Wilder (who nearly died as a result of this operation) in proving a case of alleged malpractice. An almost insurmountable obstacle is now placed in her path in that after clearing the hurdle as to the burden of proof (no easy task) she must now fend off evidence negating her claim in the unchartered abyss of possibilities.

For the foregoing reasons the court recuses himself in this case.

December 31, 1992

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Martin F. Loughlin
Senior Judge

John Kalled, Esq.
Robert Larsen, Esq.